82-6343

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

83-663

Plaintiff-Appellee,

-and-

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff-Appellee,

-against-

THE STATE OF NEW YORK; and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendant-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff-Appellee,

-against-

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York.

LODGING

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES OF AMERICA

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ON APPEAL FROM THE UNITED STATES DISTRICT
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BRIEF FOR PLAINTIFF-APPELLEE UNITED STATES OF AMERICA

STATEMENT OF ISSUES PRESENTED

1. Whether an applicant for a preliminary injunction in federal court who has no adequate remedy at law in federal court must also show the absence of an adequate legal remedy in state court as a prerequisite to obtaining preliminary injunctive relief?

2. Whether the State of New York has consented to be sued in its Court of Claims for the unconstitutional acts of its Legislature not involving the taking of real property?

3. Whether the State of new York has consented to be sued in its Court of Claims for lost busines revenues and customer goodwill occasioned by the State's taking of real property under its power of eminent domain?

4. Whether a showing of injury due to unconstitutional state conduct constitutes irreparable injury for purposes of preliminary injunctive relief regardless of whether the injury can be quantified in monetary terms?

5. Whether the record evidence of monetary injury was sufficient to justify a satisfactory showing of irreparable injury for purposes of preliminary injunctive relief.

INTRODUCTION

This is an action by the United States and by private parties against the State of New York for unconstitutionally assuming ownership of a general aviation airport in Suffolk County, Long Island known as Republic Airport, and for unconstitutionally imposing a nighttime ban on the use of the airport by all aircraft regardless of the levels of noise they make. Facing the prospect of severe business losses from the curfew, plaintiff Beachcraft East, Inc., which sells and services planes at Republic, moved below for entry of a preliminary injunction prohibiting New York from imposing the nighttime curfew. The motion was supported by the United States which had also prayed for a permanent injunction

of the curfew in its complaint. The court below granted Beechcraft's motion for a preliminary injunction finding first, that New York's curfew was overbroad and arbitrary and thus a violation of the Supremacy Clause of the United States Constitution, and second, that Beechcraft would suffer irreparable business damages because the Eleventh Amendment to the Constitution precluded suit in federal court against New York for monetary liability.

New York now asks this Court to vacate the lower court's preliminary injunction exclusively on the ground that Beechcraft has not demonstrated irreparable injury from the curfew. New York does not appeal the district court's finding that its curfew is unconstitutional.

This action is based on New York's passage of a law in June, 1982, purporting to take over the ownership of Republic Airport from the Metropolitan Transportation Authority (MTA) and to impose a total ban on all aircraft operations at Republic Airport between the hours of 11 p.m. and 7 a.m. daily. The airport curfew applies to all aircraft regardless of the noise level they make during landing or take-off.

The United States and Beechcraft East seek to have the statute declared unconstitutional and the airport curfew enjoined for violating three clauses of the federal Constitution: the Supremacy Clause, the Commerce Clause, and the Contract Clause.*/ Beechcraft, which is a tenant at Republic Airport

*/ The third plaintiff in this suit, the Aircraft Owners and Pilots Association (AOPA) does not allege that New York acted unconstitutionally under the Contract Clause. AOPA does allege that New York's curfew violates the Supremacy and Commerce Clauses.

leasing space from the MTA, does not claim that New York's actions constitute a de facto appropriation of its leasehold interest without just compensation in violation of either the United States or New York State Constitutions. Nor does Beechcraft contend in its complaint that New York's challenged law breaches existing contracts between the State and Beechcraft. Beechcraft's complaint is for injury to its business directly resulting from the state's passage of an unconstitutional law.

In support of the present appeal, New York suggests three grounds for reversal of the preliminary injunction with respect to the issue of irreparable injury. First, New York argues that Beechcraft can sue New York for lost business profits in its Court of Claims on a breach of contract theory or on a de facto appropriation of real property theory. Second, New York contends that assuming it cannot be sued for damages, Beechcraft, therefore, stands to incur a monetary injury without a remedy which is, in effect, no legally cognizable injury. Finally, New York concludes that Beechcraft has not shown that its financial injury will lead to bankruptcy which the State argues is a prerequisite for demonstrating irreparable injury. None of these arguments can withstand close scrutiny.

In support of its argument that Beechcraft has an adequate remedy in the New York Court of Claims, the State argues that Beechcraft can sue for lost profits on a breach of contract threory or on a de facto appropriation theory. Beechcraft's complaint, however, is not based on either theory. Yet, even if it were, Beechcraft could not prevail. Beechcraft does not allege, and New York does not indicate, that any contract exists between

itself and Beechcraft requiring that Republic Airport be kept open twenty-four hours each day. Without such a contract there, of course, can be no breach. New York's suggestion of an inferred de facto taking claim is no stronger. It is well-established under New York law that neither an owner nor a tenant of real property appropriated by the State under its power of eminent domain may recover for the loss of business profits or goodwill occasioned by the taking. Bopp v. State, 19 N.Y. 2d 368, 280 N.Y.S. 2d 135, 227 N.E. 2d 37 (1967). Beechcraft contends that these are its only losses since the challenged New York statute will not deprive Beechcraft of any part of its leasehold interest at Republic.

New York's alternate argument that the non-availability of a monetary remedy against the State means no injury ab initio and thus no injury capable of qualifying as irreparable injury simply stands logic on its head. It is the fact that Beechcraft cannot pursue a remedy for the loss of its business profits because of New York's sovereign immunity that makes the company's injury irreparable and the issuance of a preliminary injunction appropriate.

Similarly, New York's fallback position that Beechcraft has not shown enough potential injury to constitute irreparable injury confuses both the amount of injury that must be shown when no alternate remedy for that injury exists, and those cases decided by this Court concerning the nature of irreparable injury where the business enterprise applying for a preliminary injunction has a remedy for damages against the defendant in the first instance.

Where no damages remedy of any kind exists, equitable considerations underlying the need for a preliminary injunction clearly require a far lesser amount of monetary injury than when the party seeking the injunction has available an ultimate damages remedy. Regardless of whether Beechcraft is considered to have a damages remedy against New York, the severity of its potential business losses from New York's blanket ban on nighttime aircraft operations is sufficiently significant to satisfy this Circuit's requisite for irreparable injury where the moving party has an alternate remedy at law for damages.

New York has passed a law which the district court has found to be unconstitutional, and the State does not challenge that finding in this appeal. Beechcraft will undeniably suffer significant financial losses from imposition of the State's curfew. The two legal theories sugested by New York for possible recovery of those losses are transparently inadequate because no facts exist to support them (in the case of the breach of contract theory) or because state law forbids them (in the case of the de facto taking theory). A preliminary injunction banning the curfew is accordingly compelled by fundamental considerations of equity. The district court did not abuse its discretion in reaching this result and its grant of a preliminary injunction should not be disturbed.

STATEMENT OF FACTS

This is an action challenging New York's efforts to take over the ownership of Republic Airport in Suffolk County, Long Island, and to impose an 11 p.m. to 7 a.m. curfew on all flight operations

into and out of the airport. Republic is located approximately 20 miles east of John F. Kennedy ("JFK") International Airport. It is used by general aviation aircraft, such as small piston driven private planes and larger twin engine aircraft, for both pleasure and business purposes and for the non-scheduled charter flights of cargo and passengers. The airport is known as a "reliever airport" which means that Republic relieves New York's major commercial airports, JFK, La Guardia, and Newark, of general aviation aircraft. It is one of only four airports in the metropolitan New York City area whose primary function is to serve as a reliever airport which is capable of accommodating all aircraft types in all weather conditions around the clock (J.A. 204-05)*/. Because of Republic's proximity to JFK and La Guardia and its all weather capability for all aircraft types, the airport is a critical component of the Federal Aviation Administration's (FAA) National Airport System Plan.**/

A. Federal Funding Of The Airport

On May 6, 1971, the United States conveyed a substantial portion (94.7 acres) of the current airport property to the MTA. (J.A. 144)

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*/ "J.A." refers to the Joint Apendix.

**/ Nov. 5, 1982 deposition of Paul L. Galis, pp. 26-28, submitted as Ex. C to Dec. 6, 1982 affidavit of Barrie L. Goldstein in opposition to motion of the United States for a protective order, filed Dec. 8, 1982.

The MTA is a public benefit corporation created by special act of the New York State Legislature. N.Y. Public Authorities Law §1260, et seq. It is a corporation given the power to enter contracts, §1265(6), and to acquire and hold real property, §1265(7). The MTA is independent of and is not governed by the supervisory powers of the New York State Department of Transportation (SDOT), §1266(8). The MTA may be both sued, §1276(1), and be held liable in tort for money damages, §1276.

Pursuant to the foregoing powers, the MTA, in exchange for the conveyance of Republic Airport property, expressly convenanted in the deed of conveyance:

> That all facilities of the Airport developed with Federal Aid and all those useable for landing and taking off of aircraft will be available to the United States at all times, without charge, for use by aircraft of any agency of the United States in common with other aircraft...

Deed, ¶8, J.A. 148 (emphasis added). The MTA also promised in the deed that "any subsequent transfer of property interests conveyed hereby will be made subject to all of the convenants, conditions and limitations contained in the instrument." Deed, ¶5, J.A. 147.

During the past eleven years of MTA's ownership of Republic Airport, the federal government has made nine grant awards to MTA for acquiring and improving the facilities at Republic. These awards totaled $6,820,782. (J.A. 206) The improvements have included, inter alia, the installation of navigational equipment, runway lighting, improvement of runway markings, and construction of drainage and fencing.

Among the covenants included in the grant agreements are the following:

> (1) not to dispose of or encumber its title or interest in Republic (Assurance No. 10, J.A. 153);
>
> (2) not to enter into any transaction which would deprive MTA of the ability to carry out all of the grant covenants unless by such transaction the obligation to perform the convenants is assumed by an agency approved by the FAA (Assurance No. 32, J.A. 155);
>
> (3) keep Republic airport open to all types, kinds, and classes of aeronautical use on fair and reasonable terms (Assurance No. 18, J.A. 154);
>
> (4) operate and maintain in a safe and serviceable condition, and whenever required, all of the airport's facilities needed to serve aeronautical uses, including the promise to have in effect, at all times, arrangements for operating the facilities (Assurance No. 22, J.A. 154); and
>
> (5) make available to the United States at all times, all of the airport's facilities developed with federal aid or used for the landing and taking off of aircraft (Assurance No. 26; J.A. 155).

In addition to these general convenants, MTA expressly agreed in the second of the nine grant agreements to operate the lighting systems funded by the grant "throughout each night of the year." Project No. 8-36-0028-02. (J.A. 208).

B. The Challenged Legislation

On June 23, 1982, the New York State Legislature enacted a statute (1) divesting MTA of its ownership of Republic Airport, (2) vesting ownership and operational responsibilities over the

airport in the State's Department of Transportation, (3) imposing a mandatory 11 p.m. to 7 a.m. curfew on the airport, except for emergency use, and (4) vesting exclusively in a citizen's commission (known as the Republic Airport Commission) the power to modify the curfew after notice and hearing. S.9450-A adding Article 15 to the Transportation Law of the State of New York by Chapter 370 of the Laws of 1982. A copy of the legislation appears at pages 101-109 of the Joint Appendix and is referred to herein as S. 9450-A.

Contrary to the referenced deed and grant covenants, neither the MTA nor the State of New York at any time obtained the FAA's permission to transfer ownership of the airport from the MTA to the State Department of Transportation. The curfew provisions of the legislation went into effect September 20, 1982.

In an undated "Notice to Airport Users" from Carl L. Stacy, Airport Manager, notice was given that

> REPUBLIC AIRPORT will be closed to aircraft operations between the hours of 11:00 p.m. and 7:00 a.m. commencing September 19 1982. During those hours the arrival and departure of aircraft is prohibited and no services will be provided by the airport operator such as runway lighting, navigational aids, landing or takeoff aids and crash-fire-rescue services.

Ex. 13 submitted in support of Plaintiff's (United States) Response To Motion of Beechcraft East, Inc. To Intervene And For A Preliminary Injunction, filed September 28, 1982 (emphasis added).

New York's decision to turn off runway lighting and naviagational aids, in addition to declaring the airport closed during curfew hours, presented, in the FAA's view, serious safety hazards (1) to those using the airport for emergency nighttime landings, (2) to those intending to land before 11 p.m. but delayed by adverse weather conditions, and (3) to those intending to use the lighted airport as a navigational aid while going to or from nearby La Guardia and JFK airports. The FAA expressed these concerns to counsel for defendants in a meeting on September 15, 1982. The following day, defendnts agreed not to turn off runway lighting and navigational aids pending litigation of the issue in this case.*/

Notwithstanding defendnts' concession on the safety-related issue of lighting and navigational aids, defendants declined to rescind transfer of the airport or the imposition of the curfew. As a result, the United States filed the instant action seeking injunctive and declaratory relief (J.A. 19) on September 17, 1982. By leave of court, the United States filed a first amended complaint on November 19, 1982 (J.A. 433).

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*/ Contrary to defendants' statement of the case at pages 7-9 of their brief, the FAA never agreed to forebear from seeking a preliminary injunction on the matter of the curfew if New York left on lighting and navigational aids during nighttime hours. The only preliminary injunction the FAA agreed not to seek was one pertaining to runway lights and navigation equipment. Because the question of a promise, vel non, not to seek a preliminary injunction on the curfew is wholly irrelevant to any issue presented below or in this appeal, the United States has not made of record any evidence refuting the hearsay allegations of defendants' affiant Clarence Cook (J.A. 81) on this point.

C. The United States' Case

The United States contends that New York violated three provisions of the Constitution when it passed S. 9450-A. First, the United States alleges that the law violates the Contract Clause of the Constitution, Art. I, Sec. 10, by impairing contract rights and obligations between the United States and the MTA. As previously noted, controlling grant agreements between the federal government and the MTA provided that the ownership of Republic Airport could not be changed without FAA approval. The United States alleges that New York never obtained approval from the FAA to assume ownership of Republic. S. 9450-A which legislatively mandates an unconsented transfer, therefor, impairs the federal government's contract rights in violation of the contract Clause of the Constitution. As a result, the United States contends that the transfer provisions of S. 9450-A are void ab initio and that New York is not the lawful owner of Republic Airport.

The United States additionally alleges that the nighttime curfew violates not only the Contract Clause of the Constitution, but also the Supremacy Clause, Art. VI, and the Commerce Clause, Art., Sec. 8. Controlling Supreme Court precedent recognizes that the power to control aircraft noise at airports has been preempted by Congress to the exclusion of all persons and entities (including municipalities) except airport owners. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973). The government alleges that airport owners, however, may only take limited action to abate aircraft noise. As this Court held in British Airways Board v. Port Authority of New York, 558 F.2d 75,

84 (2d Cir. 1977), an airport owner is vested "only with the power to promulgate reasonable, nonarbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs." The United States contends in this case that since New York's efforts to become the proprietor of Republic Airport were void ab initio in light of the Contract Clause's prohibition on the impairment of contract rights, the State cannot avail itself of the proprietor exception to noise abatement plans recognized by the Supreme Court in City of Burbank, supra. Accordingly, the curfew stands in violation of the Supremacy Clause. It was the position of the government below that this violation of the Supremacy Clause was compounded by the fact that the legislation adopting the curfew was itself a product of an exercise of New York's police power in violation of the proscriptions established by the City of Burbank, supra.

The federal government additionally contends in this case that even assuming New York is held to have imposed the curfew in its capacity as a lawful airport proprietor, the curfew is overbroad, unreasonable, and arbitrary and thus violative of the Supremacy and Commerce Clauses for reasons recognized by this Court in British Airways, supra.

Beechcraft also pleads each of the foregoing theories of constitutional infirmity with respect to S. 9450-A. J.A. 20-21, ¶¶2, 6, and 7. Beechcraft does not plead any causes of action against New York based on breach of contract or on the de facto appropriation of its leasehold interest at Republic.

D. Proceedings Below

The United States filed its complaint on September 17, 1982. On September 22, 1982, Beechcraft East filed an order to show cause for leave to intervene and for a temporary restraining order and a preliminary injunction. On September 28, 1982, the United States filed a brief supporting Beechcraft's motion for a preliminary injunction with respect to the issue of likelihood of success on the merits. The United States did not take a position on the issue of irreparable harm because, at the time, it lacked knowledge of the nature of Beechcraft's claimed financial injury. Oral argument was heard by the district court on October 1, 1982, and on October 7, 1982, the lower court granted Beechcraft's motion to intervene and its motion for a preliminary injunction. J.A. 199. The court supplemented its order granting the preliminary injunction with a Memorandum Decision and Order filed October 14, 1982. United States v. State of New York, 552 F. Supp. 255 (N.D.N.Y. 1982), J.A. 203.

Beechcraft's complaint incorporated by reference all allegations and counts of the complaint filed by the United States J.A. 20, ¶2. In addition, Beechcraft included a Commerce Clause count not made by the United States in its original complaint, and a Supremacy Clause count that was slightly broader in scope than the federal government's original Supremacy Clause count. J.A. 21, ¶¶6 and 7.

On October 22, 1982, the lower court also consolidated a related action that had been filed against the State by AOPA. AOPA, like Beechcraft, attacked the curfew legislation on Supremacy and Commerce Clause grounds.

On November 19, 1982, the United States filed a first amended complaint which expanded the scope of its Supremacy Clause count and added a Commerce Clause count. J.A. 433. The amended pleadings made the complaints of all three plaintiffs coextensive with respect to Supremacy and Commerce Clause allegations. Contract Clause counts were presented only by the United States and Beechcraft.

In its supporting memorandum, the district court found that Beechcraft had satisfied this Circuit's requirements for preliminary injunctive relief by making a clear showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious question going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. 552 F. Supp. at 261, J.A. 211. On the issue of irreparable harm, the lower court noted that Beechcraft had demonstrated a business loss "that is certainly not remote or speculative, but [is] actual and imminent." Id. at 262, J.A. 214. In reaching this finding, the court relied on evidence submitted by Beechcraft showing that as the result of the curfew, over twenty-five customers had given notice of their intention to relocate to another airport, with additional cancellations coming in daily. Id. at 261-62, J.A. 212. After finding the existence of business losses due to New York's curfew, the lower court found that Beechcraft had no adequate remedy at law against the State in light of the Eleventh Amendment. Id. at 262, J.A. 214. The court noted on this point:

> For this loss there is no adequate remedy at law, and, therefore, the fact that the loss may be only a small percentage of Beechcraft's nation-wide and international revenue is irrelevent. There is no requirement in this Circuit that a party wait until near-extinction before moving for a preliminary injunction. The law, like the Constitution, is not a suicide pact.

Ibid.

With respect to Beechcraft's likelihood of prevailing on the merits of its constitutional claims, the lower court focused on plaintiffs' claim that New York's curfew violated the Supremacy Clause of the federal Constitution. The court noted that under City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), the Supreme Court had found that Congress had preempted the area of airport noise control for the FAA, with the exception that airport proprietors were given "special, although undefined, leeway in controlling the sources of aircraft noise directly." 552 F. Supp. at 263, J.A. 217. The lower court then noted that this Court gave definition to that "leeway" in British Airways Board v. Port Authority of New York, 558 F.2d 75 (2d Cir. 1977), when it held that in light of congressional efforts to preempt the area of airport noise control, an owner is vested "only with the power to promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs." 552 F. Supp. at 264, J.A. 220, quoting from British Airways, supra, 558 F.2d at 84.

On the basis of the record, the lower court found that New York's curfew law, S. 9450-A, is "overbroad, unreasonable and arbitrary." 552 F. Supp. at 265, J.A. 220. The court noted in support of its finding that:

> [t]he curfew extends to all aircraft, regardless of the degree of accompanying emmitted noise. In fact, Article 15 makes no reference to noise levels measured in decibles as a factor in particular plane prohibition during the 11:00 P.M. to 7:00 A.M. curfew.
>
> ** ** **
>
> Moreover, as the Sate admits, only 14 flights occur during the forbidden hours -- a mere 2.6 percent of the total daily aircraft traffic. A total proscription of flights during the curfew period, it seems to this court, is unreasonable in view of the sparsity of flights during the curfew hours."

Ibid. (emphasis in the original).

Following the court's opinion, the State took discovery of Beechcraft to determine the extent of its contemplated financial losses due to the curfew. Following this discovery, the State moved to vacate the preliminary injunction. The State did not base its motion on the court's finding that the curfew was unconstitutional. Instead, the State limited its motion to the issue of whether Beechcraft had truly demonstrated irreparable injury. At oral argument on the motion, the court reaffirmed its earlier ruling that the State had not waived its sovereign immunity from suit for lost business profits occasioned by the curfew. J.A. 430. The State now appeals from the denial of its motion to vacate. Because the district court was correct in concluding that

New York had not waived its immunity from suit for money damages in the context of the facts presented by this case, the lower court's preliminary injunction should not be set aside.

ARGUMENT

SUMMARY

The major portion of New York's argument in support of setting aside the injunction of its airport curfew is that Beechcraft East has an adequate remedy at law for money damages against the State in its Court of Claims. There are two errors with this contention. First, the existence, vel non, of an adequate legal remedy in state court is irrelevant to the question of whether an injunction should issue in federal court. What is relevant is the question of whether the movant has an adequate remedy at law in federal court. If he does not, then for purposes of issuing an injunction, he has satisfactorily demonstrated the inadequacy of a legal remedy irrespective of whether he has one in state court. Di Giovanni v. Camden Fire Insurance Ass'n, 296 U.S. 64, 69 (1935). New York does not contend that Beechcraft has a legal remedy against the State in federal court. As a result, there was no error in the lower court concluding that Beechcraft lacked an adequate remedy at law against the State.

Yet even if the district court were required to consider the adequacy of legal remedies in state court, New York has not waived its sovereign immunity from the type of action presented by the present case. All plaintiffs, including Beechcraft, sue the State on account of injury caused by implementation of an unconstitutional statute. It is a well-established principle of New York

State law that the State cannot be held monetarily liable for the unconstitutional actions of its Legislature which do not involve the taking of real property. Fonfa v. State, 88 Misc. 2d 343, 388 N.Y.S. 2d 65 (Ct. Cl. 1976).

New York replies that Beechcraft's case is really one for breach of contract and for the de facto taking of its leasehold interest in Republic. There are several shortcomings with this argument. First, Beechcraft never pleads either cause of action in its complaint. Second, insofar as New York claims to be the successor in interest to contracts between Beechcraft and the MTA prohibiting curfews, Beechcraft and the United States claim that New York's efforts to take over the airport and succeed as the successor in interest to those contracts were voided ab initio by operation of the Contract Clause of the Constitution. Third, Beechcraft could not recover against New York on a de facto taking theory because state law prohibits the recovery of lost business revenues or customer goodwill (Beechcraft's only losses) as the result of property taken by the State under its power of eminent domain. Bopp v. State, 19 N.Y. 2d 368, 280 N.Y.S. 2d 135, 227 N.E. 2d 37 (1967).

In the alternative, the State argues that even if Beechcraft was without a legal remedy, it was reversible error for the district court to make a related finding of irreparable injury solely on the basis of no adequate remedy at law. Contrary to the State's position on this point, the lower court's action of merging the two tests for injunctive relief was proper when the basis for finding no adequate remedy at law was the absolute

inability of Beechcraft to ever obtain money damages from the State. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929).

Yet even if the lower court were required to look elsewhere for a finding of irreparable injury to support the issuance of a preliminary injunction, two valid grounds existed. First, the fact that Beechcraft had alleged and the lower court had found that New York had acted unconstitutionally in enacting a curfew, constituted a prima facie showing of irreparable injury. Henry v. Greenville, 284 F.2d 631, 633 (4th Cir. 1960). Second, Beechcraft's showing that absent an injunction it would suffer significant business losses and go out of business at Republic, was sufficient under the law of this Circuit to establish a showing of irreparable injury. Semmes Motor, Inc. v. Ford Motor Company, 429 F.2d 1197 (2d Cir. 1970).

At issue in this appeal is the existence of state conduct that has been found to be unconstitutional, conduct which will cause Beechcraft to lose substantial business revenues, and conduct for which there is no legal remedy in either federal or state court. Under these circumstances, it was undeniably proper for the lower court to find that Beechcraft had made a satisfactory showing of irreparable injury. No argument advanced by the State justifies setting aside this ruling.

I. BEECHCRAFT HAS NO DAMAGES REMEDY AGAINST NEW YORK IN FEDERAL COURT

The lower court found that Beechcraft would be irreparably injured by New York's curfew because the company had no remedy at law against the state in federal court in light of the Eleventh

Amendment. 552 F. Supp. at 262, J.A. 214. New York contends that the district court erred in concluding Beechcraft lacked an adequate remedy at law because the State's Court of Claims Act permits Beechcraft to sue the state for money damages in its own state court system. Implicit in the State's argument is the position that a contention of an inadequate remedy at law cannot be sustained if there is an adequate remedy in state court although there is no adequate legal remedy in federal court. This position is wrong as a matter of law.

It has long been held by the Supreme Court that the measure of whether a legal remedy is adequate for purposes of determining the appropriateness of an injunction is based on the existence of a legal remedy in federal court alone. Alabama Comm'n v. Southern R. Co., 341 U.S. 341, 359 (1951); DiGiovani v. Camden Fire Insurance Assn., 296 U.S. 64, 69 (1935). Accord, Oneida Indian Nation of New York State v. County of Oneida, New York, 464 F.2d 916, 922 (2d Cir. 1972). Commenting on the measurement of an adequate remedy at law in the context of considering a request for injunctive relief, the Supreme Court has noted:

> It is true, as this Court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law. This follows from the nature of "equity jurisdiction" of the federal courts.

** ** **

> If a plaintiff is entitled to be heard in the federal courts he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford.

DiGiovanni v. Camden Fire Insurance Ass'n, supra, 296 U.S. at 69 (citations omitted) (emphasis added).

New York neither contends nor suggests that Beechcraft has an adequate remedy at law against the State for damages in federal court. The State's only suggested legal remedy is in its own Court of Claims. As noted above, such a forum for legal redress is wholly irrelevant to the question of whether Beechcraft has an adequate remedy at law for purposes of considering the appropriateness of a preliminary injunction in federal court.*/ The lower court's reliance on the existence, vel non, of an adequate legal remedy in federal court was legally required as a matter of federal law and should not be reversed.

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*/ The existence of an adequate state court remedy may in limited curcumstances, not present here, be considered by a federal court in deciding whether to grant an injunction where the interest of a plaintiff is "relatively unimportant when compared to some overwheming public interest." Alabama Comm'n v. Southern R. Co., supra, 341 U.S. at 360. A leading example is the appropriateness of considering the state court remedies of a state criminal defendant who seeks to enjoin a state criminal proceeding. Younger v. Harris, 401 U.S. 37 (1971). Despite the arguable public interest in the State's curfew by homeowners living close to Republic Airport, their interest is purely a local one of restricted dimensions and in no realistic sense can be characterized as "overwhelming" from a state-wide perspective. See generally, Allied Structural Steel Co. v. Spannus, Attorney General of Minnesota, 438 U.S. 234, 248-249 (1978).

II. BEECHCRAFT HAS NO DAMAGES REMEDY AGAINST NEW YORK IN STATE COURT

Notwithstanding the foregoing discussion of controlling Supreme Court law holding that the existence of an adequate remedy at law is based on the adequacy of a legal remedy in federal and not state court, the legal result obtains that even in state court Beechcraft has no adequate remedy at law against New York.

The nub of Beechcraft's case against the State is that it will lose business revenues because of New York's statutorily imposed curfew at Republic Airport. New York responds that if it has acted improperly in establishing the curfew, Beechcraft can recover its anticipated losses against the State under New York's Court of Claims Act. New York is in error. The Court of Claims Act only waives the State's liability for money damages with respect to actions that can be brought against individuals or companies, such as actions in tort or for breach of contract.

The case at bar is not a tort suit, not a breach of contract action, nor a claim for the wrongful taking of property. In short, the instant action is about damage caused by New York's implementation of an unconstitutional law not involving the appropriation of real property. New York law is abundently clear that the State has not waived its liability for money damages on account of such sovereign conduct. As a result, Beechcraft has no adequate remedy at law against the State.

A. New York Has Not Waived Its Liability For Money Damages For The Unconstitutional Act Of Its Legislature.

The State pitches the major portion of its appeal on New York's Court of Claims Act. Section 8 of the Act provides:

> The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court aqianst individuals or corporations ....

(Emphasis added.)

Section 9 of the Act further provides with respect to the jurisdiction of the Court of Claims:

> To hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property of any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such ...

As reflected by the foregoing statutory language, the Court of Claims Act waives New York's immunity from liability only with respect to actions that can be brought against "individuals or corporations." Act, § 8. The "waiver of immunity by the State (Court of Claims Act, § 8) is inapplicable here where the activity complained of is sovereign in character and cannot be likened to functions which could be carried on by a private person or corporation." Bernkrant v. State, 26 A.D. 2d 964, 274 N.Y.S. 2d 749 (3d. Dept. 1966) [No waiver of immunity by State for damages caused by State Rent Administrator who refused to approve a tenant eviction]. Accord, Southworth v. State, 62 A.D. 2d 731, 405

N.Y.S. 2d 548, aff'd 47 N.Y. 2d 874, 419 N.Y.S. 2d 71, 392 N.E. 2d 1254 (1979); Granger v. State, 14 A.D. 2d 645, 218 N.Y.S. 2d 742 (3d Dept. 1961).

In the case at bar, Beechcraft contends that it will suffer substantial business losses leading to financial collapse from the State's imposition of a blanket curfew at Republic Airport pursuant to legislation enacted by the State Legislature. Beechcraft contends that the legislation, which mandates the curfew, unconstitutionally violates the Supremacy, Commerce, and Contract Clauses of the United States Constitution. See Beechcraft Complaint, ¶¶ 2, 6, and 7, J.A. 20-21. Beechcraft does not plead a breach of contract count against the State or a count based on the de facto taking of its leasehold interest at Republic. The sole and exclusive predicate for Beechcraft's alleged damages is that it was injured as the result of an unconstitutional state law.

Individuals and corporations not being sovereigns cannot pass laws (whether constitutional or not) and, thus, actions in damages cannot be brought against them for the results of such legislation. For this reason, section 8 of New York's Court of Claims Act does not waive the State's immunity from liability for the consequences that flow from laws enacted by its legislature, even if they are unconstitutional.

In a Court of Claims case squarely on point, the Court held that New York had not waived immunity from liability for the enactment of unconstitutional statutes. Fonfa v. State, 88 Misc. 2d 343, 388 N.Y.S. 2d 65 (Ct. Cl. 1976). In Fonfa, claimant sued the State for illegal arrest and detention pursuant to an

allegedly unconstitutional state statute. Taking as true claimant's allegations that the statute in question was unconstitutional, the Court of Claims noted:

> On that basis, the legal question becomes: In this court of limited jurisdiction, can the state be held liable for its enactment of statutes later declared unconstitutional? My answer is: No.

Id at 67. Quoting from a State Court of Appeals decision in Barrett v. State of New York, 220 N.Y. 423, 425 (1917), the Court of Claims in Fonfa observed:

> We know of no principle of law under which the state becomes liable because of the adoption of an unconstitutional statute.

Ibid.

The rationale for this result stems from the obvious fact, noted above, that enactment of legislation is inherently a sovereign responsibility for which no private person or corportion could be sued. As noted by the Appellate Division of the New York Supreme Court in Newiadony v. State of New York, 276 App. Div. 59, 61; 93 N.Y.S. 2d 24, 26 (3d. Dept. 1949), quoted with approval by the Court of Claims in Fonfa, id. at 68:

> How far the argument of full analogy of State to private acts may run will be illustrated if the consequences of legislative policies be considered. Often laws enacted for the public welfare are destructive of private activities. If an individual or corporation acted thus destructively there could be no doubt that remedy would be readily found in the courthouse.

> But the inconveniences of legislative dispositions of policy are not a proper subject for claims against the government. No government could function thus hedged in by lawsuits. If it were the legislative intention to assume a liability on any such revolutionary scope, it would demand unmistakeable language.

Aside from the foregoing characterization of Beechcraft's complaint as one not involving a conract or de facto taking count, New York does not disagree with any of the cited legal principles including the holding of Fonfa, supra. Indeed, the State candidly acknowledges that the "passage of legislation is an act only performed by the sovereign." State's Brief at 24. Thus, the only issue presented by the State's argument on this point is whether this case involves some type of additional, presumably non-articulated, cause of action for which the State has consented to be sued under its Court of Claims Act. If, in the final analysis, this case is only about injury caused by an unconstitutional state law not involving the taking of real property, all parties agree that Beechcraft has no damages remedy against New York.

B. New York's Suggested Legal Theories Are Inadequate.

Recognizing the correctness of Fonfa, supra, the State attempts to remedy the previously discussed shortcoming in its Court of Claims argument by arguing for the first time in this case that Beechcraft affirmatively pleads causes of action which

can be remedied under the Court of Claims Act.*/ Two counts are alleged. The first is a breach of contract cause of action, and the second is one based on a de facto appropriation of a real property interest. As discussed below, neither count is alleged, and if either were, neither could succeed.

1. No Contracts Prohibiting A Curfew Are Alleged By Beechcraft To Have Existed Or Been Breached.

New York contends Beechcraft has plead a breach of contract count against the State based on paragraphs 8-12 of Beechcraft's Complaint and on paragraphs 24-28 and 33-37 of the United States' Complaint which Beechcraft incorporates by reference. State's Brief p. 21. An inspection of these paragraphs denies the State's contentions.

Paragraphs 8-12 of Beechcraft's Complaint, J.A. 21-22, allege that Beechcraft entered into a contract with the MTA for the purpose of leasing land and facilities at Republic Airport owned by the MTA. Beech Complaint, ¶8, J.A. 21. Beechcraft does not allege in its Complaint, and New York has never contended, that MTA agreed under the leasing agreement to keep Republic open 24 hours each day. Beechcraft does allege that it entered into service contracts with customers using Republic's facilities to

*/ In its motion to vacate the preliminary injunction, the State raised for the first time the availablity of a remedy under its Court of Claims Act. While it indicated the general types of actions that could be brought against the State under the Act, it did not indicate which of Beechcraft's counts qualified for review under that Act. It is only in its brief on appeal that the State, for the first time, advises plaintiffs how Beechcraft might proceed.

provide "twenty-four hour service and flights on demand." Beech Complaint ¶11, J.A. 22. Again, Beechcraft makes no allegation, however, that the MTA or the State Department of Transportion was a party to these agreements.

Beechcraft's allegations in its complaint do not affirmatively plead any contract with the MTA or the State requiring that the airport be left open around the clock. And as noted, New York does not contend itself that such agreements actually exist.

Examination of allegations made in the Complaint of the United States, and adopted by Beechcraft, also fails to reveal any cognizable breach of contract counts capable of advancement by Beechcraft. Paragraphs 24-28 of the federal government's Complaint, J.A. 14-15, are for violations of the Contract Clause of the Constitution, Art. I, Sec. 10, and not for a breach of contract. Specifically, the United States alleges that its contract rights with MTA requiring FAA approval of Republic's transfer and the 24 hour availability of the airport for the government's use were impaired by New York's passage of S. 9450-A. This count is clearly one for unconstitutional conduct by a sovereign state in contravention of Article I, Section 10 of the Constitution. It is not for a breach of contract.

Paragraphs 33 through 37 of the United States are breach of contract counts against the State. For two reasons they do not state causes of action on which Beechcraft could prevail. First, the contracts alleged are the nine grant agreements and one deed of transfer between the United States and the MTA. Beechcraft was

not a party to these agreements. As a result, Beechcraft can only claim third party beneficiary status from these covenants. But it is well-established in the field of federal grant and contract law that one who is not a recipient of federal monies may not claim third party beneficiary status for purposes of securing damages if the grant or contract is not honored. Merritt v. United States, 267 U.S. 338, 341 (1925).*/ The State agrees with this contention. Relying on Cort v. Ash, 422 U.S. 66 (1975), and Nat'l Aviation v. City of Hayward, 418 F. Supp. 417, 429 (N.D. Cal. 1976), New York argued below:

> We submit that the federal statutes and the grants upon which the FAA bases its claim do not establish a private right of action [for Beechcraft] since Beechcraft was not intended to be a third-party beneficiary and [sic] thereunder.

Defnd's Mem. of Law In Opposition To The Proposed Intervenor's Motion For A Preliminary Injunction at 5 n.(*), filed Sept. 30, 1982. In light of these precedents, and for reasons articulated by New York below, Beechcraft has no cause of action against the State for alleged violations of grant obligations it would have undertaken as MTA's lawful successor in interest.

Both Beechcraft and the United States allege, however, that New York is not MTA's lawful successor in interest because the Contract Clause voids ab initio the attempt of S. 9450-A to

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*/ Accord, Gardiner Manufacturing v. United States, 479 F.2d 39 (9th Cir. 1973); Brister & Koester Lumber Corp. v. United States, 90 F. Supp. 695 (Ct. Cl. 1950).

transfer ownership of Republic Airport.*/ Thus, even assuming Beechcraft could claim third party beneficiary status with respect to contracts between the United States and the MTA, the State is not a successor in interest to those agreements and no contract exists with the State to be breached.

New York's allegations of contract counts by Beechcraft are thus denied both by the facts of this case and by controlling law.

2. New York Law Prohibits Recovery Of Lost Business Profits Resulting From The State's Appropriation Of Real Property.

In the alternative to a suggested breach of contract claim, New York contends that Beechcraft can recover against the State on a de facto appropriation of real property theory. The State does not contend that Beechcraft has even alleged such a cause of action but only that it has been "implicitly stated" in paragraphs 13 through 15 of its Complaint. State's Brief at 21.

Beechcraft, however, has neither stated nor implied a cause of action for the de facto taking of all or part of its leasehold interest at Republic. Paragraphs 13 through 15 of its complaint simply allege that it will suffer severe business losses if the curfew is allowed to proceed unenjoined. J.A. 23. This is merely a statement of injury and not of a legal theory for recovery.

*/ The Supreme Court has held that a state law which impairs a contract right in violation of the Contract Clause is "not a law" because the Constitution forbids it. Poindexter v. Greenhow, 114 U.S. 270, 288 (1884). New York, thus, does not stand in MTA's shoes with respect to any contract agreements between MTA and the federal government over the operation of Republic.

It is not surprising that Beechcraft has declined to plead a de facto taking theory for an inspection of New York law reveals that such a cause of action for lost business revenues is not recognized.

The State of New York may appropriate the property of its citizens either by the power of eminent domain or by its police power. While both have "much in common...there is nevertheless a sharp distinction between them." 19 N.Y. Juris. Eminent Domain § 2, p. 191. The "state takes property by eminent domain because it is useful to the public and under the police power because it is harmful." Lemp v. Town Bd. of Islip, 90 Misc. 2d 360, 394 N.Y.S. 2d 517, 521 (Sp. Ct. 1977).

The power of eminent domain is "inherent in the state, it is an attribute of sovereignty resting upon political necessity, and as essential to the effective existence of the state as the police power and power of taxation." 19 N.Y. Juris, supra, at §4, p. 193. Accord, Georgia v. Chattanooga, 264 U.S. 472, 480 (1924). The power of eminent domain "is not a property right or an exercise by the state of an ultimate ownership of the soil, but...is based on the sovereignty of the state." 26 Am. Jur. § 3 pp. 641-42 (1966).

Owners whose property is acquired by New York under its power of eminent domain are entitled to just compensation by virtue of Article 1, Section 7 of the State Constitution and by the 5th Amendment to the federal Constitution as applied to the states through the Fourteenth Amendment, Penn Central Transp. Co. v.

New York City, 438 U.S. 104, 123-28 (1978). In such cases, both constitutions reqire payment of just compensation for the appropriated property and the question of sovereign immunity is of no consequence to the state's liability. Keystone Assoc. v. State of New York, 39 A.D. 2d 176, 333 N.Y.S. 2d 27, 28 (3d Dept. 1972), aff'd on opinion below, 33 N.Y. 2d 848, 352 N.Y.S. 2d 194 (1973). By comparison, where New York takes property under its police power, such as where it legislates zoning or provides the machinery to enjoin noxious use, there is no right to compensation by the affected owner. Lutheran Church in America v. City of New York, 35 N.Y. 2d 121, 129, 359 N.Y.S. 2d 7, 14, 316 N.E. 2d 305, 310 (1974); Lemp v. Town Board of Islip, supra, 394 N.Y.S. 2d at 521. Accord, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980).*/

In the case at bar, it is of no consequence whether New York's taking of Beechcraft's leasehold interest at Republic (as suggested by the State itself) is a taking under New York's police power or its power of eminent domain. If the de facto taking is pursuant to the State's police power, then under the cited authorities, no compensation is required. If, on the other hand, the taking is under New York's power of eminent domain, controlling state law discussed below prohibits Beechcraft from recovering for lost business revenues and customer good will.

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*/ See generally, Fred F. French Inv. Co., Inc. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S. 2d 5, 350 N.E. 381, cert. denied, 429 U.S. 990 (1976). But see, Loretto v. Teleprompter Manhattan CATV Corp., 50 U.S.L.W. 4988 (June 30, 1982) (physical intrusion upon real property under state's police power constitutes a compensable taking).

In the absence of a specific statutory provision to the contrary, New York law prohibits both an owner of appropriated property, or a lessee holding a leesehold interest in the property, from recovering against the State for the "loss of business profits" or for the loss of customer "good will." 19 N.Y. Jur. Eminent Domain §187 p. 424, §233 p. 478; Bopp v. State, 19 N.Y. 2d 368, 280 N.Y.S. 2d 135, 227 N.E. 2d 37 (1967); Re New York, W.S. & B.R. Co., 42 Sup. Ct. 633, 35 Hun. 633 (5th Dept. 1885).*/ New York's law on this point is the prevailing view. 27 Am Jur 2d, Eminent Domain §353, p. 198; United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Petty Motor Co., 327 U.S. 372 (1946). The rationale for this result is that the loss of business, profits, or good will is not land or real estate in the constitutional sense and, thus, not subject to just compensation under considerations of eminent domain. See generally, Newark v. Cook, 99 N.J. Eq. 527, 537, 133 A. 875, 879 (1926), aff'd without opin., 100 N.J. Eq. 582, 135 A. 915, cert. denied, McEuey v. Newark, 274 U.S. 757 (1927).

New York does nothing more in its brief than hypothesize that Beechcraft may have an implied de facto appropriation theory for the alleged loss of business revenues. Indeed, New York could not

*/ Accord, Strong v. State, 38 A.D. 241, 328 N.Y.S. 2d 913 (3d Dept. 1972); Garfield Homes, Inc. v. State of New York, 44 Misc. 2d 738, 255 N.Y.S. 2d 16, 24 (Ct. Cl.), aff'd sub nom., Great Atlantic & Pac. Tea Co. v. State, 25 A.D. 2d 905, 269 N.Y.S. 2d 487 (3d Dept.), modified, 22 N.Y. 2d 75, 291 N.Y.S. 2d 299, 238 N.E. 2d 705 (1968). See generally, 53 Cornell L. Rev. 604, 627, et seq. (1968).

suggest any actual taking of real property per se since the record below does not reflect such an event. The State is thus defeated by its own law which prohbits recovery for the loss of business profits occasioned by a taking of property under the power of eminent domain.

The State places heavy reliance in its brief on Keystone Assoc. v. State of New York, supra. Yet Keystone stands for no more than the well-recognized rule that a state which takes property under its power of eminent domain, whether by statute or by administrative process, must pay just compensation to those having an interest in the property. The United States takes no issue with this fundamental constitutional principle.

It is the position of the United States, and of the court below, that when New York injures a private party through the passage of an unconstitutional law not appropriating real property, the State has not waived its immunity from monetary liability. Such was the holding of the Court of Claims in Fonfa v. State, supra. No dicta in Keystone or in any other authority cited by the State gainsays this result.

The State attempts to discount the importance of Fonfa at pages 24 and 25 of its brief by arguing that the district court acted illogically in not following the "analytical framework used by the Fonfa Court." New York argues that after recognizing that "the passage of legislation is an act only performed by the sovereign," the lower court failed to consider "whether the enactment of the curfew was undertaken by the State in a sovereign capacity or was rather the action of a proprietor which incidentally is

also a sovereign." State's brief at 24. The illogic, however, lies not with the district court's reasoning, but with that of the State. The State suggests only two possible causes of action that Beechcraft could bring against it for money damages, i.e., breach of contract and de facto appropriation. Yet neither has anything to do with the State acting in a proprietary capacity. The power to make contracts is not an aspect of property law, and the power of a state to acquire property by virtue of its police power or its power of eminent domain is exclusively sovereign in character and not proprietary. 26 Am. Jur. 2d (1966) §3 pp. 641-42. Insofar as New York contends that the imposition of a curfew can support a breach of contract or a de facto taking claim, it is a non sequitur to talk in terms of the State imposing a curfew in its capacity as a proprietor.

The State's reliance on Drake v. State of New York, 97 Misc. 2d 1015, 416 N.Y.S. 2d 734 (Ct. Cl. 1979), aff'd, 75 App. Div. 2d 1016, 432 N.Y.S. 2d 676 (4th Dept. 1980), fails to clarify the ambiguity of its argument on this point. At issue in Drake was whether the State, as the owner of park land, owed a duty of care to protect users of the park from ambush by indians illegally occupying the land. The suit was one for tortious conduct, not for breach of contract or for de facto taking.

Indeed, even if the State could construct a cause of action that Beechcraft might bring based upon the curfew being the improper action of the State in its role as airport proprietor, the case would fail. As noted earlier, both Beechcraft and the

United States contend that the Contact Clause of the Constitution renders New York's efforts to take over ownership of Republic Airport void ab initio. Poindexter v. Greenhow, 114 U.S. 270, 288 (1884). A cause of action pitched on the State's conduct as owner of Republic, therefore, fails at the start.*/

The conclusion reached by the lower court that Beechcraft's lawsuit is exclusively one about business injury caused by an unconstitutional state law is undeniably correct. Under the Court of Claims analysis of its jurisdiction in Fonfa, supra, and cited authorities, the lower court was correct in concluding that Beechcraft has no remedy at law against the State for money damages. The district court's finding of irreparable injury was thus proper and should not be set aside.

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*/ The court below did not reach Beechcraft's Contract Clause argument preferring, instead, to limit its analysis to Supremacy Clause issues. United States v. State of New York, supra, 552 F. Supp. at 262-63, J.A. 215. The district court did, however, decide adversely to Beechcraft the issue of whether New York was acting in its police power capacity or its proprietary capacity when enacting the curfew into law. Beechcraft had urged that New York was only acting under its police power role. The district court concluded that New York acted simultaneously under both capacities. 552 F. Supp. at 264, J.A. 218-19. The lower court's ruling only goes to the power relied upon by the State to pass the challenged legislation. It does not reach the question of whether the end result of using that power was denied by virtue of the Contract Clause.

Insofar as the State seeks to rely on the lower court's ruling, New York must concede that its suggested de facto taking cause of action lacks merit since such an action must be predicated on the assumption that the State acted under its power of eminent domain. The district court, however, found only that New York acted under its police and propietary powers.

III. HAVING FOUND THAT BEECHCRAFT HAD NO REMEDY AT LAW AGAINST NEW YORK, THE LOWER COURT CORRECTLY FOUND THAT BEECHCRAFT HAD SHOWN IRREPARABLE INJURY.

A. The Absence Of A Legal Remedy For Money Damages Constitutes Irreparable Injury.

Assuming Beechcraft was indeed without a legal remedy for damages against New York, the State argues in the alternative that the lower court erred in concluding that Beechcraft had also satisfied the irreparable injury prong of the test for preliminary injunctive relief simply because it could not recover damages from the State. The district court's action, however, of merging the concept of an adequate remedy at law with that of irreparable injury was proper under the circumstances of this case and is not a ground for reversal.

New York correctly observes that long-standing Supreme Court precedent on the granting of injunctive relief requires the existence of "irreparable harm and the inadequacy of legal remedies," Beacon Theatries v. Westover, 359 U.S. 500, 506-507 (1959). The United States also does not take issue with New York's characterization of the lower court's ruling as one which implicitly found both considerations satisfied once it concluded that the Eleventh Amendment barred a monetary recovery by Beechcraft. The State errs, however, when it contends that the lower court was wrong to undertake this merger. State's brief at 28.

Irreparable injury in the context of a preliminary injunction is injury which will occur before the trial court can render judgment on the grant of a permanent injunction and which cannot later be remedied by an action at law. Thus in a suit against the State of Louisiana to enjoin the imposition of an oil tax, the Supreme Court found that plaintiff's inability to recoup payments pendente lite of the disputed tax from the State, constituted grounds for a preliminary injunction and, thus, a showing of irreparable injury. Ohio Oil Co. v. Conway, 279 U.S. 813 (1929). Relying on Ohio Oil, the United States District Court for the Northern District of Alabama has noted in Int'l Assn. of Firefighters v. City of Sylacauga, 436 F. Supp. 482, 492 (N.D. Ala. 1977):

> It is well settled that a federal court should not issue an injunction unless there is both irreparable injury and lack of an adequate remedy at law. If an injury cannot be adequately remedied at law, because damages would be either inadequate or unascertainable the injury is generally held irreparable. Thus, the requirements of irreparable injury and lack of adequate legal remedy merge.

(Citations omitted.) (Emphasis added.) The appropriateness of merging the requisites of an adequate remedy at law with irreparable injury has been favorably noted by former Judge Mulligan of this Court in a law review article on preliminary injunctions in

the Second Circuit.*/ 43 Brooklyn L.Rev. 831, 838 (1977). In his treatment of the matter, he cited with approval the following dicta of the United States District Court for the Northern District of Texas in Mesa Petro. Co. v. Aztec Oil & Gas Co., 406 F. Supp. 910, 913 (N.D. Tex. 1976):

> There is a great overlap among these standards [for preliminary injunctive relief] partly concealed by their seriatim listing. And with irreparable injury the overlap may be almost complete at least as to the 'adequacy of the remedy at law'... If, for example, money damages can make the applicant whole, the remedy at law is adequate and the injury is not irreparable.

In the case at bar, Beechcraft cannot be made whole for its anticipated damages because of the Eleventh Amendment. On the precedent of the foregoing authorities, it was correct for the district court to conclude that Beechcraft had satisfied the requisite showing of irreparable injury in light of its inadequate legal remedy.

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*/ The theme of Judge Mulligan's article was that the requisite of irreparable injury should be satisfied before injunctive relief is granted notwithstanding the possible inference from Sonesta Hotels Corp. v. Wellington Assoc., 483 F.2d 247 (2d Cir. 1973), that the Second Circuit had abandoned the requirement. The Circuit subsequently made clear that irreparable injury is, indeed, a mandatory requisite for injunctive relief. See, Sperry Int'l Trade v. Gov't of Israel, 670 F.2d 8, 11 (2d Cir. 1982).

The State argues that under such a result, one dollar in damages would satisfy the requirement of irreparable injury. The short answer to this contention is that one dollar would likely not qualify as a real harm in the sense the word is used in measuring the need for injunctive relief. And even if it were to qualify, the normal balancing of equitable factors would proportionately reduce the significance of the irreparable injury standard in the overall equation of relief. As noted also by the court in Mesa Petroleum, supra, and cited with approval by former Judge Mulligan,

> the courts have added as a measure, the 'balancing of equities.' This is probably no more than another means of expressing an ultimate conclusion that, all things considered, the final determined relief is proper.

406 F. Supp. at 913. As will be noted in the next section of this argument, Beechcraft's injury as measured by New York is on the order of $300,000, and as measured by Beechcraft, on the order of many millions of dollars. The plaintiff's irreparable injury under either standard is substantial.

New York also attacks the lower court's merger of the related standards for equitable relief as turning "the Eleventh Amendment on its head." State's brief at 31. The State argues that since Beechcraft cannot sue the State for damages, it has no compensable injury which it can label as irreparable harm for purposes of securing injunctive relief. The argument falls of its own weight.

The fact that Beechcraft cannot sue New York for damages resulting from the Republic curfew is what makes Beechcraft's injury irreparable. The fact that the Eleventh Amendment is the causation of the inadequate legal remedy is irrelevant. Such was precisely the point made by the Supreme Court in Ohio Oil Co. v. Conway, supra, where the Court noted in the context of an analogous Eleventh Amendment setting:

> If the tax be paid during the pendency of the suit, and the statute be adjudged invalid by the final decree, the plaintiff will be remediless. The laws of the State afford no remedy whereby restitution of the money so paid may be enforced, even where the payment is under both protest and compulsion.*/

279 U.S. at 815. The Court concluded that the State's immunity from suit gave rise to plaintiff's entitlement to a preliminary injunction.

More recently, the Court has had occasion to observe in the context of a civil rights action against a state and its officers that a state's "immunity from damages does not ordinarily bar equitable relief as well." Wood v. Strickland, 420 U.S. 308,

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*/ The Court's emphasis on the absence of an adequate legal remedy in state court as opposed to federal court appears misplaced in light of its later holding in DiGiovanni v. Camden Fire Insurance Ass'n, 296 U.S. 64, 69 (1935). See discussion supra at pp. 21-22. Regardless of whether DiGrovanni would require emphasis on the adequacy, vel non, of an adequate legal remedy in federal court, the same result obtains that the State's immunity from suit for the recoupment of money was not only not a defense to a preliminary injunction, but instead was the reason to issue one.

314 n. 6, reh. denied, 421 U.S. 921 (1975). Accord, Tayyari v. New Mexico State Union, 495 F. Supp. 1365, 1370 (D.N. Mex. 1980).

New York's argument appears to confuse the appropriateness of granting injunctive relief against states which seek to expend funds from the State's treasury, In re Ayers, 123 U.S. 443 (1887), with those that do not, Ex Parte Young, 209 U.S. 123 (1908). The latter type of injunction is not barred by the Eleventh Amendment. See generally, Edelman v. Jordan, 415 U.S. 651 (1974).

The preliminary injunction at issue in this appeal is prohibitory in nature; it restrains New York and its officers from implementing a state law banning nighttime flights at an airport. Insofar as the State has decided, regardless of the litigation, to leave runway lighting, navigational equipment, and crash-fire-rescue services in operation throughout the night,*/ permitting planes to use the airport at night will not cause the increased expenditure of state revenues.**/ The State does not contend the contrary. As a result, enjoining the curfew will neither offend the Eleventh Amendment, nor as the State contends,

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*/ Dfnds' Mem of Law In Opposition To The Proposed Intervenor's Motion For A Preliminary Injunction, p. 25 n.(*), filed Sept. 30, 1982.

**/ Even if modest expenditures incidental to the injunction occurred, they would not render the relief fatal under the Eleventh Amendment. Edelman v. Jordon, supra, 415 U.S. at 667.

require it to "surrender the very immunity guaranteed by the Eleventh Amendment." State's brief at 32.*/

B. Assuming A Legal Remedy Exists For Beechcraft, It Would Not Be Adequate

Even assuming Beechcraft could sue New York for business revenues lost as a result of the State's curfew, the remedy would not be adequate to compensate the plaintiff both because New York's actions violate important constitutional rights and because lost revenues and accompanying good will are too difficult to measure.

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*/ The State's reliance on DiGiovanni v. Camden Fire Insurance Assoc., supra, is also of no assistance. At issue in the case was whether, for purposes of exercising a federal court's equity jurisdiction, a party seeking injunctive relief could demonstrate the inadequacy of a legal remedy in federal court on the ground that the court lacked subject matter jurisdiction over the legal cause of action. The Supreme court said no, noting that the "want of the jurisdictional amount in controversy which deprives a federal court of its authority to act at law is not ground for invoking its equity jurisdiction." Id. at 69-70. This result has no bearing on whether a state's immunity from monetary liability defeats a claim for injunctive relief since, as noted supra, a state's immunity is no defense to an injunction which does not seek the expenditure of revenues from its fisc. As the Court noted in Di Giovanni, "whether a suetor is entitled to equitable relief in federal courts... is strictly not a question of jurisdiction in the sense of the power of a federal court to act." 296 U.S. at 69.

The court below undeniably had the power to enjoin New York's curfew, and Beechcraft's showing of no adequate legal remedy coupled with the showing of likely success on the merits was the justification for exercising that power.

1. Constitutional Injury

As noted earlier, the entire substance of each plaintiff's case against New York, including Beechcraft's, is that the State has acted unconstitutionally in its efforts to take over Republic Airport and impose a nighttime curfew. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, Federal Practice and Procedure, §2948, p. 440; Planned Parenthood v. Citizens for Com. Action, 558 F.2d 861, 867 (8th Cir. 1977); A Quaker Action Group v. Hickel, 421 F.2d 1111, 1116 (D.C. Cir. 1969); Keefe v. Geanakos, 418 F.2d 359, 363 (1st Cir. 1969). And when a person clearly establishes by undisputed evidence that he is being denied a constitutional right, a "district court has no discretion to deny relief by preliminary injunction." Henry v. Greenville, 284 F.2d 631, 633 (4th Cir. 1960). See generally, Battle v. Municipal Housing Authority for the City of Yonkers, 53 F.R.D. 423 (S.D. N.Y. 1971); Lollis v. New York State Dep't of Social Services, 322 F. Supp. 473, 483 (S.D. N.Y. 1970). While a bare allegation of unconstitutional conduct alone does not demand a finding of irreparable injury, certainly a finding of unconstitutional conduct does.

Such is the situation in the case at bar where the lower court affirmatively found unconstitutional conduct by New York. In considering Beechcraft's contention that the curfew constituted unconstitutional conduct preempted by Congress for the FAA and thus violative of the Supremacy Clause, the district court held:

> Here, the Court finds that Article 15's curfew is overbroad, unreasonable and arbitrary.
>
> ** ** **
>
> ...the curfew provision of Article 15 is overbroad and constitutionally impermissible in view of federal pre-emption of regulations concerning noise and planes in flight.

552 F. Supp. at 265, J.A. 220-21.

This action stands at a point far advanced from the pleadings stage where only accusations of unconstitutional conduct are found. A full record based on adversarial affidavits, and conflicting federal and state statutory requirements was before the court at the time it reached its finding of unconstitutional conduct.*/

*/ New York argues that to the extent the lower court agreed with Beechcraft's claims of significant financial losses, the State should have been granted an evidentiary hearing to dispute the claims. State's brief at 41 n.(*). The State, however, never requested a hearing on Beechcraft's motion for a preliminary injunction. It was only in the context of its motion for reconsideration that New York asked for a hearing.

It is the law of this Circuit that if a party who resists a preliminary injunction "is unwilling to have the issuance of a temporary injunction decided on affidavits, he must make his objection known; he may not gamble on the judge's accepting his affidavits rather than his adversary's and then seek a reversal if the result is disappointing." Sec v. Frank, 388 F.2d 486, 493 n.6 (2d Cir. 1968) (emphasis added); accord, Jacobson & Co., Inc. v. Armstrong Cork Co., supra, 548 F.2d at 442. New York did not object to the lower court's original resolution of Beechcraft's motion for a preliminary injunction on affidavits. On the contrary, it placed strong reliance on the affidavit of its own witness, Clarence Cook, Director of the Aviation Bureau of the State Department of Transportation. That New York gambled and lost is not sufficient ground to retry the same fact contentions with live testimony.

Additionally, the benefits of live testimony have been adequately subserved by the State's deposition of Beechcraft's Vice President submitted by the State as an exhibit of record. Such has been found by this Court to militate against the need for an evidentiary hearing in the context of a preliminary injunction contest. Armstrong Cork, ibid.

New York does not appeal this finding. The record remains unchallenged that all plaintiffs, including Beechcraft, have been denied important constitutional protections. On the basis of the cited authorities, it would have been correct for the district court to have found the existence of irreparable injury even if Beechcraft had an ultimate legal remedy against New York for damages.

2. Financial Injury

It would also have been correct for the lower court to have found irreparable injury solely on the basis of the magnitude of Beechcraft's anticipated financial losses.

Contrary to defendants' contention at page 36 of their brief, a corporation which seeks preliminary injunctive relief in the Second Circuit need not show the prospect of certain bankruptcy to satisfy this Court's requisite of irreparable injury. It is enough to show loss of significant business opportunities, Semmes Motors, Inc. v. Ford Motor Company, 429 F.2d 1197 (2d Cir. 1970); loss of customer good will, Jacobson & Col, Inc. v. Armstrong Corp. Co., 548 F.2d 438 (2d Cir. 1977); or public confusion over a product's owner, Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76 (2d Cir. 1981).

While the United States defers to Beechcraft to discuss more fully the specific nature of irreparable harm it will suffer from New York's imposition of a blanket curfew at Republic, the government does note that the undisputed record places Beechcraft's projected losses from the curfew at an amount far in excess of the $300,000 claimed by the State. State's Brief at 38.

The November 12, 1982 affidavit of Beechcraft's Vice President, Allen K. Pepin, J.A. 405, points out that the State erroneously places excessive emphasis on revenues derived from tenant customers for hanger and tie-down service. Pepin affd't ¶ 3, J.A. 406. He states that the "imposition of a curfew at Republic Airport would have a domino effect upon Beechcraft East, Inc.'s business (of selling aircraft)," ibid, since potential customers for the purchase of aircraft are those who are satisfied tenants in residence at Republic. Pepin affdv't ¶4, J.A. 406. A curfew will cost Beechcraft the loss of many of these tenants who will move their planes to airports open at night, 552 F. Supp. at 261, J.A. 210-212. Mr. Pepin testifies that in light of the serious downturn in the aircraft industry due to the recession (as evidenced in part by the company's current operating deficit), lost aircraft sales resulting from the curfew will require the plaintiff "to discontinue its operation at Republic Airport." Pepin affdv't ¶¶ 8 & 9, J.A. 407-08.

To lose customers, and ultimately a business, means far more than dollars and cents. It means frustration, loss of self-esteem, and doubt in the legitimacy of the free enterprise system. Mr. Pepin's testimony serves as the best evidence of this point:

> Q. Now, the point of this paragraph, was to demonstrate that if the curfew goes into effect, your business is going to be severely impacted in terms of the current amount of money that you already expended, is that right?

A. Yes, that is correct.

Q. For the fuel trucks that you purchased, could you sell those trucks?

A. Well, everything could be sold. The question is, I don't want to sell the fuel trucks. I want to put fuel in the customer's airplanes, for which I bought it. And, I will never get my money out of it.

Dep. tr. at p. 39B (emphasis added). As this Court has noted in Semmes Motors, Inc. v. Ford Motor Co., supra, 429 F.2d at 1205:

> But the right to continue a business in which [plaintiff] had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; [plaintiff] wants to sell automobiles, not to live on the income from a damages award.

(Emphasis added).

Beechcraft's showing of irreparable economic harm has not been successfully countered by the State's discovery. Even assuming the waiver of immunity by the State, such would not constitute an adequate remedy at law for Beechcraft. Under these circumstances, it would have been proper for the district court to have found a showing of irreparable injury even if an ultimate damages remedy had existed.

CONCLUSION

The preliminary injunction issued by the lower court enjoining unconstitutional state conduct was providently granted and should not be set aside on this appeal.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 82-6343

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-and-

BEECHCRAFT EAST, INC.,

Intervenor-Plaintiff-Appellee,

-against-

THE STATE OF NEW YORK; and WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York,

Defendant-Appellants.

AIRCRAFT OWNERS AND PILOTS ASSOCIATION,

Plaintiff-Appellee,

-against-

WILLIAM HENNESSEY, as Commissioner of the Department of Transportation of the State of New York.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 1983, copies of the United States' Brief as Plaintiff-Appellee were served on

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